STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 141752

DONALD RICHARDSON,
Defendant-Appellant.

Third Circuit Court No. 08-13456
Court of Appeals No. 291617

141752

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S PRO PER APPLICATION FOR LEAVE TO APPEAL

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals

TONI ODETTE
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5785

Table of Contents

Table of Authorities

CASES

STATUTES AND RULES

Counterstatement of Jurisdiction

The People accept and adopt defendant's statement of jurisdiction.

Counterstatement of Issues Presented

I.

In order to claim self-defense, the action taken by defendant must have appeared at the time to be immediately necessary to defend himself or another. Here, defendant responded to a woman hitting his house with a bat by firing six shots into her and another victim as they were walking away from the scene. Was defendant's use of deadly force necessary to defend himself or another?

The trial court answered, "No."
The Court of Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

II.

(The People have broken defendant's Issue II into two separate issues)

A trial court has wide discretion in matters of trial conduct and a defendant is not deprived of a fair trial because of judicial comments unless those comments are "so egregious and fundamentally unfair" that they result in actual prejudice. Here, the judge corrected defense counsel's impeachment methods and asked the attorney not to raise his voice when addressing the bench. The trial court dismissed the jury before further chiding defense counsel. Was defendant denied a fair trial?

The trial court answered, "No."
The Court of Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

III.

(The People have broken defendant's Issue II into two separate issues)

The trial court does not abuse its discretion in failing to repeat instructions addressing areas that were not included in a jury's specific request for instruction. Here, the trial court defined the terms "home" and "curtilage" in response to the jury's specific question for the meaning of "home," but then did not repeat the definition of "curtilage" a second time when the jury indicated they could not make a decision. Was it error for the trial court not to redefine "curtilage" for the second time when not asked to do so by the jury?

The trial court answered, "No."
The Court of Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

Counterstatement of Facts

The People accept and adopt defendant's statement of facts, except for conclusions of fact and law. Additional facts may be presented *infra* in the Argument sections of this brief.

Argument

I.

In order to claim self-defense, the action taken by defendant must have appeared at the time to be immediately necessary to defend himself or another. Here, defendant responded to a woman hitting his house with a bat by firing six shots into her and another victim as they were walking away from the scene. Defendant's use of deadly force was not necessary to defend himself or another.

Standard of Review

While defendant frames it somewhat differently, the question here is really whether sufficient evidence existed to convict defendant of assault with intent to do great bodily harm (ABGH) despite his claim of self-defense. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[1] "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[2] This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses.[3]

Discussion

After being properly instructed regarding defendant's claim of self-defense, the jury rejected that claim and correctly found defendant guilty of two counts of AGBH for firing six shots into two *fleeing* victims, one of whom was completely unarmed. The elements of AGBH are (1) an attempt

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[1] *People v Wolfe,* 440 Mich 508, 515 (1992).

[2] *People v Allen,* 201 Mich App 98, 100 (1993).

[3] *People v Wolfe, supra,* 440 Mich at 514.

or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.[4] Here, there is little dispute that defendant armed himself with three loaded guns, pushed his wife into the house, said he was "sick of this shit," pointed his gun at the two fleeing victims, fired four shots directly into Ms. Abrams and two shots directly into Mr. Dinwiddie, and then reloaded his gun.[5] The question, therefore, is not whether there was sufficient evidence to convict defendant of AGBH, but whether defendant properly acted in self-defense. The jury – along with the Michigan Court of Appeals – correctly determined that he did not.

To establish lawful self-defense or defense of another, the evidence must show that: (1) the defendant honestly and reasonably believed that he or another was in danger; (2) the danger feared was death or serious bodily harm; and (3) the action taken appeared at the time to be *immediately necessary* to defend himself or another.[6] Defendant is only entitled to use the amount of force necessary to defend himself.[7] While there is no affirmative duty to retreat when one is within his own dwelling or within the curtilage of that dwelling, the defendant still must honestly and reasonably believe that it is necessary for him to exercise deadly force.[8]

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[4]MCL 750.84; *People v Parcha*, 227 Mich App 236, 239 (1997).

[5]References to the trial record are cited by the date of the hearing followed by the page number; 1/12, 83-88, 139-142; ½6, 21-24, 114-116.

[6]*People v Riddle*, 467 Mich 116, 119 (2002); *People v Kurr*, 253 Mich App 317, 321 (2002).

[7]*People v Kemp*, 202 Mich App 318, 322 (1993).

[8]MCL 768.21c(1)(2); *People v Riddle*, *supra*, 467 Mich at 142.

Here, the two victims and a witness all testified to roughly the same version of events. The first victim, Brandy Abrams, testified that she went over to Mrs. Richardson's house to confront her after hearing that she had hit Abrams's son.[9] Mrs. Richardson (defendant's wife) was on her front porch "ranting and raving" and telling Abrams that she was going to "whoop her ass."[10] After Mrs. Richardson spit on her, Abrams picked up a bat and hit the screen door.[11] At that point, the second victim, Dennis Dinwiddie, went over to the Richardson yard in an effort to mediate the situation. He testified that he went over to get Abrams so that nobody would get hurt.[12] As the two were walking away from the Richardson's, they heard defendant say that he was "sick of this shit" and then heard gunfire.[13] Ms. Abrams was shot four times.[14] Mr. Dinwiddie testified that he suffered a gunshot wound to the side of his back.[15]

A neighbor who witnessed the event, Teresa Moore, corroborated the victims' testimony of what happened. She testified that she was the one who had called Abrams to tell her that Mrs. Richardson had hit her son.[16] She further testified that Mrs. Richardson had been on her porch screaming and throwing hot water, eggs, and rocks at Moore and the neighborhood children for some

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[9]1/12, 76.

[10]Id. at 77-79.

[11]Id. at 81.

[12]Id. at 137.

[13]Id. at 139-141.

[14]Id at 88, 155.

[15]Id. at 140.

[16]1/26, 12-14.

time before Abrams even appeared on the scene.[17] When Abrams arrived, she tried unsuccessfully to talk to Mrs. Richardson and then swung a bat at the porch railing.[18] Defendant was just sitting there, uninvolved in the fight, until he stood up, said he was tired of what was going on, fired six shots directly at the victims, and then reloaded the gun.[19]

Given these facts, there was little evidence to support a finding of self-defense. Besides the defendant himself, none of the other witnesses claimed that Abrams hit or threatened either Mrs. Richardson or the defendant. Indeed, Mrs. Richardson was either on her porch or actually in her home for the majority of the altercation and defendant was not even involved in the fight until he pulled out his gun. Further, the defendant himself testified that he essentially loaded three different guns that afternoon, secured two on his hips and one on his ankle, and then waited outside.[20] In addition to witness testimony, the jurors also saw the medical records of the two victims, proving that Abrams was shot in four separate places and Dinwiddie was shot in the back.

So, through both witness testimony and physical evidence, sufficient evidence existed to prove that the two victims were *walking away* from defendant when he started shooting at them. Because of this, and because Abrams only hit the house with the bat, it was not immediately necessary for defendant to defend himself or his wife. Viewing the evidence in a light most favorable to the prosecution, a jury could conclude beyond a reasonable doubt that defendant was not justified in using deadly force against his fleeing victims. Thus, defendant's first claim must fail and defendant's application for leave to appeal should be denied.

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[17]1/26, 11-14.

[18]Id. at 18-20

[19]Id. at 20-24.

[20]Id. at 111-116.

II.

A trial court has wide discretion in matters of trial conduct and a defendant is not deprived of a fair trial because of judicial comments unless those comments are "so egregious and fundamentally unfair" that they result in actual prejudice. Here, the judge corrected defense counsel's impeachment methods and asked the attorney not to raise his voice when arguing with the bench. The trial court dismissed the jury before further chiding defense counsel. Defendant was not denied a fair trial.

Standard of Review

Because trial counsel did not object to the trial court's comments or conduct, review is for plain error. "Reversal is warranted only when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence."[21] It is defendant's burden to establish plain error and prejudice.[22]

Discussion

Defendant was not denied a fair trial merely because Judge Jackson corrected the defense attorney for improper impeachment and asked the attorney not to raise his voice. The party claiming bias "must overcome a heavy presumption of judicial impartiality."[23] The test to determine judicial partiality is whether the conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial."[24] Judicial comments

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[21] *People v Ackerman*, 257 Mich App 434, 448-449 (2003).

[22] *People v Carines*, 460 Mich 750, 763, 771 (1999).

[23] *People v Wells*, 238 Mich App 383, 391 (1999).

[24] *Lansing v Hartsuff*, 213 Mich App 338, 349-350 (1995), quoting *People v Collier*, 168 Mich App 687, 698 (1988); *People v Paquette*, 214 Mich App 336, 340 (1995).

occurring during a trial that are critical, disapproving, or hostile to an attorney generally cannot be relied upon to demonstrate partiality.[25] Likewise, displays of annoyance, anger, frustration, impatience, or dissatisfaction, if deemed within the bounds of what individuals may on occasion display, cannot establish partiality.[26] Indeed, the trial court has wide discretion and power in matters of trial conduct[27] and defendant is only entitled to a new trial if he can demonstrate that the allegedly improper comments were "so egregious and fundamentally unfair" that they resulted in actual prejudice.[28]

Here, viewing the record as a whole, the trial court's comments did not deprive defendant of a fair and impartial trial. The record is replete with instances of the trial court sustaining defense counsel's objections, allowing defense counsel to question witnesses without interruption or comment, and giving weight to defense counsel's arguments. Likewise, while Judge Jackson did express frustration with defense counsel's line of questioning in attempting to impeach the victim and defense counsel's tone of voice in speaking to the bench, he promptly dismissed the jury before chiding defense counsel's methods and attitude.[29] The trial court did not comment on the evidence or question the credibility of any of the witnesses. To the contrary, the comments made by Judge Jackson were the direct result of defense counsel's refusal to follow instructions and persistence in disrespectfully arguing with the judge.

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[25] *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30 (1996).

[26] *Id.*

[27] MRE 611 (a); see *People v Collier*, *supra*, 168 Mich App at 698.

[28] *People v Johnson*, 245 Mich App 243, 268 (2001).

[29] 1/26, 77.

Further, even if there were some degree of prejudice as a result of Judge Jackson's comments, any such prejudice was mitigated by the trial court's instruction to the jury that his comments and questions were not evidence. Judge Jackson specifically instructed the jurors that it was his duty to make sure the trial was conducted according to the law and that they should pay no attention if they believe he had a personal opinion about the case.[30] Jurors, of course, are presumed to follow their instructions."[31] Thus, the curative instruction sufficiently negated any such perceived prejudice.

Ultimately, Judge Jackson's comments to the defense attorney about whether the impeachment methods were proper hardly rose to the level of fundamental unfairness. To the contrary, such comments are within the trial court's power to control the proceedings and any further comments made merely showed a frustration with defense counsel's refusal to follow instructions. The judge properly dismissed the jury before making any further comments about defense counsel's conduct or attitude. Thus, defendant is unable to establish actual prejudice, there is no indication that the trial court's comments in any way deprived defendant of a fair trial, and defendant's application for leave to appeal should be denied.

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[30] 1/26, 153.

[31] *People v Unger*, 278 Mich App 210, 235 (2008).

III.

The trial court does not abuse its discretion in failing to repeat instructions addressing areas that were not included in a jury's specific request for instruction. Here, the trial court defined the terms "home" and "curtilage" in response to the jury's specific question for the meaning of "home," but then did not repeat the definition of "curtilage" a second time when the jury indicated they could not make a decision. It was not error for the trial court not to re-define "curtilage" for the second time when not asked to do so by the jury.

Standard of Review

Preserved claims of instructional error are reviewed de novo.[32] This Court reviews jury instructions in their entirety to determine if there is an error requiring reversal.[33] Even imperfect instructions, however, do not constitute error if they fairly present the issues to be tried and sufficiently protect the defendant's rights.[34] Further, harmless error review applies to preserved claims of instructional error.[35] A preserved, nonconstitutional error is not a ground for reversal unless it is more probable than not that the error was outcome determinative.[36]

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[32] *People v Hubbard (After Remand)*, 217 Mich App 459, 487 (1996).

[33] *People v McGhee*, 268 Mich App 600, 696 (2005).

[34] *People v Whitney*, 228 Mich App 230, 252 (1998); *People v McFall*, 224 Mich App 403, 412-13 (1997).

[35] *People v Cornell*, 466 Mich 335, 362-364 (2002); *People v Morris*, 139 Mich App 550, 559 (1984).

[36] *Cornell, supra*, 466 Mich at 363-364.

Discussion

Defendant was not prejudiced by the trial court's refusal to re-instruct the jury on the definition of "curtilage" because the jury had already heard the definition, did not specifically ask to be re-instructed on the definition, and was otherwise properly instructed. A trial court is not obligated to repeat previously given instructions so long as the "court's supplemental instruction was responsive to the jury's request and did not serve to mislead the jury in any manner."[37] When the jury asks a specific question, the trial court is not required to give *all* of the instructions previously given, merely those specifically asked for by the jury.[38] In *People v Parker*, for example, the trial court initially instructed the jury on the elements of first- and second-degree murder and the elements of self-defense. When the jury subsequently asked to be re-instructed as to the elements of murder, the trial court again gave the elements of the crime, but did not also re-instruct on self-defense. This Court held that the trial court did not err in failing to re-instruct on self-defense, as the jury did not ask for that instruction to be re-read.[39]

Here, after being read the jury instructions for self-defense – including the instruction that there is no duty to retreat when one is within his home – the jurors deliberated for a day and then asked for clarification regarding what is considered to be the "home." At defense counsel's urging, the trial court then read the jurors the self-defense instruction and then informed them that there was no duty to retreat before using deadly force if defendant was in his home or within the curtilage of that

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[37]*People v Katt*, 248 Mich App 282, 311 (2001).

[38]*People v Parker*, 230 Mich App 677, 681 (1998); *People v Darwell*, 82 Mich App 652, 663 (1978).

[39]*People v Parker*, *supra*, 230 Mich App at 681.

dwelling.[40] Curtilage, Judge Jackson went on to instruct the jury, means the "land or yard adjoining a house, usually within an enclosure." Defense counsel affirmatively stated that he was satisfied with the instruction.[41] When the jury came back and informed the trial court that it was unable to make a decision, Judge Jackson again instructed the jurors on self-defense and informed them yet again that there was no duty to retreat when one is within the curtilage of his dwelling.[42] After the jury was dismissed, defense counsel asked the trial court to re-instruct on the definition of "curtilage" and Judge Jackson declined, stating that he had already given the jurors that definition.

Unlike the first time, the jury did not ask to be re-instructed when it came back the final time. Instead, they simply informed the trial court that they could not make a decision. The judge, in turn, re-instructed them on self-defense and, once again, said that there was no duty to retreat when one is within the curtilage of his dwelling. Because the jurors did not ask the judge to redefine curtilage, the trial court did not abuse its discretion in not repeating the entire definition. The jury was instructed on all of the charges and defenses several times and there is no evidence that the jury was in any way confused by the instructions. Thus, the fact that the court did not repeat a definition which it had already given did not prejudice defendant or deprive him of a fair trial. Defendant's final argument, therefore, also fails, and defendant's application for leave to appeal should be denied.

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[40] 1/27, 16-19.

[41] Id. at 20.

[42] 1/29, 4-12.

Relief

THEREFORE, the People request this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

TONI ODETTE (P72308)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
313-224-5785

TO/js
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